78-1866

Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979
No. ~~77-2214~~

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, LODGE #82, Petitioner,

-v-

DETROIT COIL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979
No. 77-1144

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, LODGE #82, Petitioner
-v-
DETROIT COIL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LODGE #82, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on March 21, 1979.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 594 F2d 575 (6th Cir 1979) and is printed in Appendix A hereto, infra, page 14. The Order of the United States District Court, Eastern District of Michigan, Southern Division, entered on December 28, 1976, is unreported and is printed in Appendix A hereto, infra, page 30. The Arbitration Award entered on July 20, 1976, is unreported and is printed in Appendix A hereto, infra, page 32.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit (Appendix A, infra, page 14) was entered on March 21, 1979. The jurisdiction of the Supreme Court is invoked pursuant to 28 USC Sec. 1254(1).

QUESTIONS PRESENTED

Whether, in a labor dispute, the decision of an arbitrator is subject to review, so long as the decision was based upon a construction of the contract and the manner in which the contract had been interpreted and applied by the parties in the past.

STATUTORY PROVISIONS INVOLVED

Jurisdiction for the United States District Court to vacate the Labor Arbitration Award was invoked by the Detroit Coil Company pursuant to 9 USC Sec. 10(d) which states as follows:

> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

STATEMENT OF THE CASE

The operative facts necessary for the resolution of this matter are as follows. A dispute arose between Detroit Coil Company (Company) and the International Association of

Machinists and Aerospace Workers, Lodge #82 (the Union) over a procedural prerequisite to the arbitration of a grievance. The merits of the grievance are immaterial to this appeal.

The parties agreed to submit to arbitration the question of whether the procedural requirements of the collective bargaining agreement had been met. The Detroit Coil Company's position was that neither it nor the American Arbitration Association had received notice of the Union's intention to arbitrate the grievance in the eight (8) day notification requirement set forth in Article V, Sec. 1(d) of the Collective Bargaining Agreement. The Union's position was that both the Company and the Union had been late in administering the steps of the grievance procedure in the past, and in this case in particular, however, neither party had ever used this excuse to deny a grievance. The notice was eleven (11) days late.

The relevant text of the grievance procedure states as follows:

> Article V
> Grievance Procedure
>
> The procedure for the adjustment of grievance shall be as follows:
>
> (a) The employee shall endeavor to adjust his grievance with the foreman and steward. If no satisfactory settlement is reached

within 24 hours, the grievance shall be placed in writing and referred to:

(b) Chief Steward and Plant Manager. If still unsettled within 48 hours, the matter shall be referred to:

(c) 1. Committee of the Union, Union officials and officials of the Company. Should the grievance not then be settled satisfactorily, the case shall be referred to the American Arbitration Association for the selection of an impartial arbitrator. Matters properly referred shall be decided by the arbitrator and shall be binding upon both parties to this Agreement. The fees and expenses of the arbitrator shall be borne equally by both parties. It is mutually agreed that whenever possible, the AAA Expididted Arbitration procedure shall be used to process grievances.

(c) 2. The committee, as referred to above, shall consist of the Chief Steward, the Departmental Steward and an authorized representative of top management. This paragraph shall not preclude either party from calling in witnesses at the proper steps during the grievance procedure.

(d) Unless the American Arbitration Association and the Company is notified within eight (8) working days from the date which last the Local Lodge meets to select an impartial arbitrator, the grievance or grievances shall be considered settled.

The arbitrator's award found that a "shop practice" existed within the grievance procedure to not deny the full run of the grievance procedure solely due to technical time requirements. (See full text of opinion - Appendix A). Therefore he concluded the grievance should be heard on the merits. The Company petitioned the District Court to vacate this award. The District Court denied the application to vacate the award, and the company appealed.

The Sixth Circuit Court of Appeals reversed, basing its decision on a determination that the award of the arbitrator was contrary to the explicit terms of the agreement and was beyond the scope of his authority. The case was remanded with directions to set aside the award of the arbitrator.

REASONS FOR GRANTING WRIT

BASIS FOR FEDERAL JURISDICTION

The Company petitioned the District Court to vacate the award of the labor arbitrator under 29 USC Sec. 185 and 9 USC Sec. 10(d) on the ground that the arbitrator exceeded his authority under the agreement by ignoring its express terms in his determination.

CERTIORARI SHOULD BE GRANTED WHEN A CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THE UNITED STATES SUPREME COURT.

In 1964, this Court in a unanimous opinion affirmed that the arbitrator in a labor dispute, not the court, was the appropriate person to decide whether the procedural prerequisites conditioning, under a labor agreement, the duty to arbitrate, had been met. John Wiley & Sons v Livingston, 376 US 543, 11 L Ed 2d 898, 84 S Ct 909 (1964). This decision recognized the importance of arbitration in the national labor policy of this industrialized country.

Wiley dealt with the effect of a subsequent merger on an arbitration clause in a bargaining agreement and certain questions of "procedural arbitrability." The company argued on the latter issue that since the first two steps of the grievance procedure were not carried out, and since the duty to arbitrate arose only at step 3, it had no duty to arbitrate. The company argued that whether procedural conditions in a grievance procedure to arbitrate had been met must be decided by a court and not by the arbitrator. The union in the case argued just the contrary--that the decision whether procedural conditions to arbitrate had been met must be decided by an arbitrator and not by the court. This Court strongly affirmed that

the decision belonged to the arbitrator, not the court.

In doing so this Court noted that to submit the question of whether a procedure to arbitrate had been met to a court would entail the very delay attendent upon judicial proceedings preliminary to arbitration that the arbitration procedure sought to overcome. In rendering its decision, this court stated:

> [S]uch delay may entirely eliminate the prospect of a speedy arbitrated settlement of the dispute, to the disadvantage of the parties (who, in addition, will have to bear increased costs) and contrary to the aims of national labor policy. Id., 376 US at 558, 11 L Ed 2d at 909, 84 S Ct at 919.

The decision concluded by a note that a party may resist arbitration once a grievance has arisen, but this could be best done in accordance with the usual purpose and policy of the arbitration clause and federal labor law to regard procedural disagreements not as separate disputes, but as aspects of the dispute which called the grievance procedures into play.

The legal principles annunciated in Wiley are in accordance with previous guidelines set out in a series of three landmark cases decided by this Court--the Steelworkers Trilogy. These cases establish a narrow and limited scope of judicial review of arbitration awards in labor disputes.

In United Steelworkers of America v Warrior & Gulf Navigation Co., 363 US 574, 4 L Ed 2d 1409, 80 S Ct 1347 (1960), this Court emphasized the need for a strong Federal policy favoring the use of arbitration to settle labor disputes. Arbitration was recognized as a major factor in achieving industrial peace. Warrior & Gulf Navigation Company went on to state that an order to arbitrate should not be denied unless it could be said with "positive assurance" that the arbitration clause was not susceptible of an interpretation that covers the asserted dispute. Id. at 582, 583, 42 Ed 2d at 1417, 80 S Ct at 1352, 1353.

In United Steelworkers of America v Enterprise Wheel & Car Corp., 363 US 593, 4 L Ed 1424, 80 S Ct 1358 (1960), this Court strengthened the federal policy favoring arbitration by granting finality to the arbitrator's award. This Court reversed the Court of Appeals for the Fourth Circuit, which had modified a lower court after weighing the facts which had been presented to the arbitrator. It was stated in Enterprise:

> [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; insofar as the arbitrator's decision concerns construction of the contract, the courts have no business over-ruling him because their

> interpretation of the contract is different from his. Id. at 599, 4 L Ed 2d at 1429, 80 S Ct at 1362.

In reversing this Court also specifically noted that a mere ambiguity in the opinion which accompanies an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce an award.

The remaining steelworkers case, United Steelworkers of America v American Manufacturing Co., 363 US 564, 4 L Ed 2d 1403, 80 S Ct 1343 (1960) stated:

> The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. Every presumption is in favor of the validity of the arbitration award. Id. at 568, 4 L Ed 2d at 1407, 80 S Ct at 1346.

The danger of the judiciary undertaking to determine the merits of a grievance under the guise of interpreting the grievance procedure was also noted. Id. at 569, 4 L Ed 2d at 1407, 80 S Ct at 1347.

In the instant case the United States Court of Appeals for the Sixth Circuit reconsidered the

Arbitrator's determination that the award found support in the contract and in prior practices demonstrating relaxation of the literal language of the grievance procedure. The Arbitrator had noted in his decision that, in previous situations, both the Company and the Union had deviated from the time constraints of the grievance procedure. The Arbitrator also noted that, specifically in the case before him, the Company had deviated from the stated time constraints. However, the Sixth Circuit went on to conclude after examining the facts of the case and the specific language used by the Arbitrator to base his decision, that the Arbitration Award had deviated from the plain meaning of the labor contract provision.

In doing so, the Court of Appeals for the Sixth Circuit reversed the District Court decision, which refused to consider the facts presented to the Arbitrator beyond determining that the issue was arbitrable and that the Arbitrator made an interpretation of the contract. The position of the District Court was in accord with the Federal policy of settling labor disputes by arbitration as expressed in the cases above. The District Court recognized, in line with Wiley, that it was the role of the arbitrator to determine the procedural issues regarding arbitrability of a grievance.

The Arbitrator had noted in his decision that

the grievance procedure time constraints had been deviated from on previous occasions. He also noted that the Company had requested more time to reply to this particular grievance and it was granted by the Union. In addition, he pointed out that the Union had never signified any intent not to arbitrate and had mailed a notification letter dated within the time constraints. No envelope was introduced to show when the letter was postmarked. Further, the Arbitrator noted that the relations between the Company and the Union were good, and to deny arbitration of this grievance would, in the view of the Arbitrator, result in deterioration of good Company-Union relations. Consequently, the Arbitrator determined that the issue was under the procedures of the grievance agreement an arbitrable grievance.

While the Sixth Circuit recognized that among the sources of guidance to which an arbitrator may look are the "practices of the shop" that have developed between the parties in the day-to-day administration of the collective bargaining agreement, it overturned the District Court decision that the Arbitration Award should stand. This determination by the United States Court of Appeals for the Sixth Circuit is in direct conflict with previous decisions of this Honorable Court, specifically the decision in Wiley. Consequently,

the District Court Order should be upheld and the decision of the Sixth Circuit should be reversed.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

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Dated: _____

APPENDIX A

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International Association of Machinists & Aerospace Workers, Lodge #82 v Detroit Coil Company, Unreported Arbitration Award in Case Number 54-30-0582-76, entered on July 20, 1976.

No. 77-1144
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DETROIT COIL COMPANY,

Plaintiff-Appellant,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, LODGE #82,

Defendant-Appellee.

Decided and Filed March 21, 1979

Before: WEICK, Circuit Judge, PHILLIPS, Senior Circuit Judge, and GREEN, Senior District Judge.*

PHILLIPS, Senior Circuit Judge. Detroit Coil Company (the Company) appeals from an order of the district court denying the Company's application for vacation of an arbitration award.

---

* The Honorable Ben C. Green, Senior Judge, United States District Court for the Northern District of Ohio, sitting by designation.

During the course of processing an employee grievance through the various steps of the contractual grievance procedure, a dispute arose between the Company and the International Association of Machinists and Aerospace Workers, Lodge #82 (the Union). The dispute concerned the Union's compliance with a notification requirement contained in Article V, the grievance procedure section of the collective bargaining agreement between the Company and the Union (the Agreement). The parties agreed to submit to arbitration the question whether that procedural requirement of the Agreement had been satisfied. The arbitrator held in favor of the Union, finding that the notification requirement of Article V had been waived by the past practices of the Company and the Union.

The Company brought this action under 29 USC Sec. 185 and 9 USC Sec. 10(d) to vacate the arbitrator's award on the ground that the arbitrator exceeded his authority under the Agreement by ignoring its express terms in his determination. The district court denied the Company's application to vacate the arbitrator's award, finding that the arbitrator had made factual determinations concerning the scope of a past practice. The district court held that the correctness of the arbitrator's decision was not

subject to review, so long as the decision was based upon a construction of the contract and the manner in which the contract had been interpreted and applied by the parties in the past.

We reverse.

I

The Company and Union were parties to a collective bargaining agreement that ran from October 1, 1975, to October 1, 1978. Article V of the Agreement set forth a procedure for the adjustment and resolution of any grievances that arose from the day-to-day administration of the Agreement. Article V provided, in pertinent part:

Grievance Procedure

1. The procedure for the adjustment of grievances shall be as follows:

(a) The employee shall endeavor to adjust his grievance with the foreman and steward. If no satisfactory settlement is reached within 24 hours, the grievance shall be placed in writing and referred to:

(b) Chief Steward and Plant Manager. If still unsettled within 48 hours, the matter shall be referred to:

(c)(1) Committee of the Union, Union officials and officials of the Company. Should the grievance not then be settled satisfactorily, the case shall be referred to the American Arbitration Association for the selection of an impartial arbitrator. Matters properly referred shall be decided by the arbitrator and shall be binding upon both parties to this Agreement. The fees and expenses of the arbitrator shall be borne equally by both parties. It is mutually agreed that whenever possible, the AAA Expedited Arbitration procedure shall be used to process grievances.

(c)(2) The committee, as referred to above, shall consist of the Chief Steward, the Departmental Steward, and an authorized representative of the Union, the Plant Manager and a representative of top management. This paragraph shall not preclude either party from calling in witnesses at the proper steps during the grievance procedure.

(d) Unless the American Arbitration Association and the Company is notified within eight (8) working days from the date which last the Local Lodge meets to select an impartial arbitrator, the grievance or grievances shall be considered settled.

(e) Discharged employees must, if aggrieved, file a grievance relating to the discharge within three (3) working days.

An employee, Douglas Caughron, filed a grievance, the merits of which are immaterial to the present appeal. The Company and Union were unable to resolve the grievance under Sections 1(a), (b), or (c) of the grievance procedure. On April 6, 1976, during the course of a Local Lodge meeting, the Union decided to refer the Caughron grievance to the American Arbitration Association (the AAA) for binding arbitration, in accordance with Section 1(d) of the grievance procedure.

The April 30, 1976, the Company received a letter from James D. Leslie, Business Representative of Lodge #82, informing it that the Union had appealed the Caughron grievance to the AAA for final resolution. Leslie's letter was dated April 15, 1976. Leonard Jennings, Labor Relations Director of the Company, wrote Leslie in response and stated that the Company regarded the grievance as settled because the Union had failed to notify the Company within the time requirement specified by Article V, Section 1(d) of the Agreement. Jennings pointed out that, pursuant to Section 1(d) of the grievance procedure, the Union was required to notify both the Company and AAA of the Union's election to pursue a grievance to arbitration within eight working days from the date of the last Lodge meeting, which, Jennings claimed, the Union had failed to do with the Caughron grievance.

In a letter to Jennings dated May 5, 1976, Leslie apologized for the fact that his April 15 letter was late. However, Leslie reiterated that the Union intended to pursue the Caughron grievance to arbitration, stating that both the Company and Union had been "late in administering the steps of the grievance procedure" in the past, but that neither party had used this as an excuse to deny a grievance.

On May 8, 1976, the Company was notified by the AAA that it had received, on April 29, 1976, a letter from the Union requesting arbitration of the Caughron grievance. The AAA indicated that it intended to proceed with an arbitration of the grievance on its merits. Jennings telephoned the AAA and stated that the Company considered the Union's request for arbitration to be untimely. In a subsequent letter to the AAA Jennings noted the specific time requirement of Article V, Section 1(d) and stated that the Union had failed to comply with that notification provision. Jennings calculated that the Company and AAA should have received the Union's request for arbitration no later than April 16, 1976.

On May 17, 1976, the tribunal administrator of the AAA, Mark Sholander, wrote a letter to both the Company and the Union. Sholander stated that, after reviewing the contentions of the parties

concerning the timeliness of the Union's request for arbitration of the Caughron grievance, the AAA had determined "that an issue as to arbitrability exists which could be determined by an Arbitrator." Thereafter, the Company and the Union agreed to submit to arbitration the question whether the Union's request for arbitration was timely, in light of the procedural time requirement of Article V, Section 1(d).

The arbitrator issued his opinion and award on July 20, 1976, finding that Caughron's grievance should be heard on the merits. The arbitrator based his decision upon the following conclusions:

> In view of the testimony and exhibits presented at this hearing, it is the opinion of this Arbitrator that although the Company did not receive the notification that the Union was taking the Caughron grievance to arbitration until April 30, 1976, the Caughron grievance should be heard on its merits. The letter from the Union to the Company containing the notification is dated April 15, 1976, which falls within the eight (8) working days as required by Article V, Section 1, paragraph (d). No evidence was presented to indicate that it was the intent of the Union to consider the Caughron grievance settled.

> In reaching this decision, the Arbitrator takes note that the parties have not used in the past the excuse of time limits to deny a grievance. Union testimony indicated that it did not insist that the Plant manager respond to grievances within the 48 hour contractual requirement. It moreover waived the time requirements in the Caughron grievance at Step 3 in order to give the owner of the Company, who was out of the city, the opportunity to make his input to the Company response dated March 8, 1976.
>
> The Arbitrator in reaching his decision takes note of the testimony given by the Plant Manager in which he stated that relations between the Company and the Union are good. To deny the arbitrability of the Caughron grievance because the Company did not receive the April 15, 1976, notification letter until April 30, 1976, would, in the view of this Arbitrator, result in a deterioration of the good Company-Union relationship.

We conclude that the award of the arbitrator was contrary to the explicit terms of the Agreement and was beyond the scope of his authority.

II

It is well settled that arbitration as a means of resolving labor disputes is favored and that

the courts refrain from reviewing the merits of an arbitration award. United Steelworkers of America v Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960); Amanda Bent Bolt Co. v UAW, Local 1549, 451 F2d 1277 (6th Cir. 1971). However, a corollary principle bearing equally on labor arbitration was articulated by the Supreme Court in Enterprise Wheel & Car Corp., 363 U.S. at 597:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Among those sources of guidance to which an arbitrator may look are the "practices of the shop" that have developed between the parties in the day-to-day administration of the collective bargaining agreement. The Supreme Court recognized this principle of contract application in United Steelworkers of America v Warrior & Gulf Navigation Co., 363 U.S. 574, 581-82 (1960):

> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law - the practices of the industry and the shop - is equally a part of the collective bargaining agreement although not expressed in it.

See also NF&M Corp. v United Steelworkers of America, 524 F2d 756 (3d Cir. 1975); H.K. Porter Co., Inc. v United Saw, File and Steel Products Workers of America, 333 F2d 596 (3d Cir. 1964).

Thus, while an arbitrator has considerable latitude, his powers are not unlimited in the resolution of labor disputes. The arbitrator is confined to the interpretation and application of the collective bargaining agreement, and although he may construe ambiguous contract language, he is without authority to disregard or modify plain and unambiguous provisions. General Drivers, Warehousemen and Helpers, Local Union No. 89 v Hays & Nicoulin, ____ F2d ____, No. 77-3221 (6th Cir., Feb. ___, 1979); Monongahela Power Co. v Local 2332 IBEW, 566 F2d 1196, 1199 (4th Cir. 1976); Timken Co. v Local Union No. 1123 United Steelworkers of America, 482 F2d 1012 (6th Cir. 1973); Textile Workers v American Thread Co., 291 F2d 894 (4th Cir. 1961). Furthermore, "[i]f the arbitrator's award has deviated from the plain meaning of a labor contract provision, it must find support in the contract itself or in prior

practices demonstrating relaxation of the literal language." NF&M Corp., 524 F2d at 759. Accordingly, it is the duty of the courts to ascertain whether the arbitrator's award is derived in some rational way from the collective bargaining agreement. See Timken Co., 482 F2d at 1015.

Article V, Section 1(d) of the Agreement in the present case clearly and unambiguously provides that "[u]nless the [AAA] and the Company is notified within eight (8) working days from the date which last the Local Lodge meets...the grievance...shall be considered settled." (emphasis added) The Local Lodge met and considered the Caughron grievance on April 6, 1976. The Arbitrator found in his opinion that the Company did not receive notification of the Union's request for arbitration until April 30, 1976. The AAA did not receive the Union letter requesting arbitration until April 29, 1976.

However, the arbitrator concluded that the Caughron grievance was arbitrable, seemingly for a number of reasons. He based his conclusion, in part, on the fact that the Union's notification letter was dated on April 15, 1976, within the eight day limitation of Article V, and because there was no evidence to indicate that the Union considered the Caughron grievance settled.

The term "notified," as used in the Agreement, must be given its ordinary meaning in the absence of evidence indicating that the parties to this contract intended to expand or otherwise deviate from that meaning. See Monongahela Power Co., 566 F2d at 1200; Timken Co., 482 F2d at 1015. The word "notified," in its ordinary usage, means the completed act of bringing information to the attention of another. Webster's Third New International Dictionary, 1545 (14th Ed. 1961). That the Union's letter was dated within the eight day time limitation of Article V, Section 1(d) might have been sufficient to satisfy the notification requirement of Article V, Section 1(d) if there was some evidence indicating this to be the parties' understanding of the term "notified." We find nothing in the record before the arbitrator to support his conclusion that the Company and Union intended to expand the scope of the word "notified" to encompass the mere dating of a letter, from the Union to the Company and the AAA, indicating the Union's intent to arbitrate a grievance. We conclude, therefore, that the arbitrator exceeded his authority in so holding.

Furthermore, the arbitrator modified, in effect, the operation of Article V, Section 1(d) to require proof that the Union considered settled a

grievance coming within this provision of the Agreement. This section does not contain any language indicating that such concession by the Union is required. Again, absent evidence to support such a finding, we must conclude that the arbitrator exceeded his authority by modifying a clear and unambiguous provision of the Agreement.

The arbitrator found as a further basis for his decision, that the Caughron grievance should be heard on the merits, that compliance with Article V, Section 1(d) had been excused by the failure of the parties in the past to enforce the time limitations of that section of the Agreement. The arbitrator noted that "the parties have not used in the past the excuse of time limits to deny a grievance." He also cited two instances where the Union did not adhere strictly to the time requirements of Article V, Section 1(b) and that during the processing of the instant grievance, the Union agreed to a Company request for more time to respond at step 1(c) of the grievance procedure.

That an arbitrator can look for guidance beyond the express terms of the contract to the past application of that contract by the parties is without question. Warrior & Gulf Navigation Co., 363 U.S. at 581-82. As this court noted in Timken Co., 482 F2d at 1015:

> A recognized law of the shop operates to provide a context for the agreements if only because of the "institutional characteristics and governmental nature of the collective bargaining process." Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1498-1500 (1959).

Here, the arbitrator rejected application of Article V, Section 1(d), essentially because he determined that prior application of step 1(b) of the grievance procedure by the Union demonstrated a relaxation of the literal language of Section 1(d).1

Although a court is precluded from overturning an award for errors in the determination of factual

---

1. We note that the arbitrator made mention of the fact that in processing the grievance, the Union acquiesced to a Company request for more time in responding at step 1(c) of the grievance procedure. The arbitrator relied on this fact, in part, in reaching his conclusion that the parties had in the past waived the time requirements of Article V. The fallacy of this reasoning is that Section 1(c) does not have any time requirement within which the Company must respond. In the absence of any facts evidencing some understanding to the contrary, we conclude that this acquiesence is not indicative of any waiver of contractual time requirement.

issues, "[n]evertheless, if an examination of the record before the arbitrator reveals no support whatever for his determinations, his award must be vacated." NF&M Corp., 524 F2d at 760. Notwithstanding the arbitrator's reliance on "past practices" arising from the application of Section 1(b), we find no evidence in the record which would allow the arbitrator to reach the conclusion that the parties to any extent waived compliance with Section 1(d) of the Agreement. The arbitrator's conclusion manifests a clear failure to draw the essence of the award from the Agreement.

Finally, the arbitrator concluded the Caughron grievance was arbitrable because "[t]o deny arbitrability...because the Company did not receive the April 15, 1976, notification letter until April 30, 1976, would...result in a deterioration of the good Company-Union relationship." Standing alone, we view this assertion as nothing more than the arbitrator dispensing "his own brand of industrial justice." In Timken Co., 482 F2d at 1015 n. 2, the court stated, as follows:

> It is axiomatic that if the arbitrator undertook to, in effect, amend the contract, to substitute his own discretion for that of the parties or to dispense "his own brand of industrial justice," the enforcement of the award must be denied.

In view of the clear and unambiguous language of Article V of the collective bargaining agreement, and since the record contains no evidence indicating a departure by the parties from the clear intendment of that language, we conclude that the arbitrator's award cannot be deduced rationally from the Agreement, nor does the award draw its essence from the Agreement.

The judgment of the district court is reversed. The case is remanded with directions to set aside the award of the arbitrator and for further proceeding not inconsistent with this opinion.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DETROIT COIL COMPANY,

Plaintiff,

-vs- C.A. No. 76-71986

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
LODGE #82,

Defendant.

_____/

ORDER

At a session of said Court held in the
Federal Building, Detroit, Michigan,
on December 6, 1976.

PRESENT: HONORABLE JAMES P. CHURCHILL
U.S. District Court Judge

Plaintiff having moved this Court to vacate the arbitration award entered on July 20, 1976, pursuant to 9 U.S.C. Section 10(d) and said matter having been heard as a motion pursuant to 9 U.S.C. Section 6, and the Court having reviewed the pleadings and considered the argument of counsel:

IT IS HEREBY ORDERED that Plaintiff's application to vacate the aforementioned award is denied.

JAMES P. CHURCHILL
U.S. District Court Judge

Entered: December 28, 1976

Approved as to form:

/s/
R. Ian Hunter

/s/
Jerome G. Quinn

AMERICAN ARBITRATION ASSOCIATION

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, LODGE #82,

-and-

DETROIT COIL COMPANY

CASE NUMBER: 54-30-0582-76

AWARD OF ARBITRATOR

The undersigned arbitrator(s), having been designated in accordance with the arbitration agreement entered into by the above-named Parties, dated _____and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARDS as follows:

The Caughron grievance is arbitrable. The Union wrote a letter to the Company dated April 15, 1976, stating the grievance was being taken to arbitration. According to the time limits of Article V, Section 1, paragraph (d) of the Agreement, the Company should have received the notification letter by April 19, 1976, but received it on April 30, 1976.

The parties in the past have not used the excuse of time limits to deny a grievance.

The Arbitrator therefore directs the parties to convene at a mutually acceptable date in order for him to hear the merits of the Caughron grievance.

/s/ (Daniel H. Kruger)
Arbitrator's signature (dated)
July 20, 1976

AMERICAN ARBITRATION ASSOCIATION

VOLUNTARY LABOR ARBITRATION TRIBUNAL

IN THE MATTER OF THE ARBITRATION BETWEEN

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, LODGE #82

-and-

DETROIT COIL COMPANY

GRIEVANCE: Douglas Caughron

CASE NUMBER: 54-30-0582-76

ARBITRATOR'S OPINION AND AWARD

Appearances

For Union Lodge #82

Theresa Peterson	Steward
Marion Brew	Chief Steward
James D. Leslie	Business Representative District 60, IAM

For the Employer

Robert Dugan	Plant Manager
Leonard Jennings	Director, Labor Relations

INTRODUCTION

This is a proceeding under Article V, Grievance Procedure of the Collective Bargaining Agreement between the Detroit Coil Company and the International Association of Machinists and Aerospace Workers, AFL-CIO Lodge #82, for the years October 1, 1975 to October 1, 1978. (Joint Exhibit #1)

The Arbitration hearing was held on July 8, 1976, at the Detroit Coil Company, 2435 Hilton Road, Ferndale, Michigan. The parties had selected Daniel H. Kruger as the Arbitrator.

At the hearing, the parties were given the opportunity to present their respective positions on this grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the parties were asked if they planned to submit post hearing briefs to the Arbitrator. Both parties replied that they would not submit briefs.

ISSUE

The issue in this Arbitration proceeding is the arbitrability of the grievance. The specific issue is: Did the Union violate the contractual provisions of Article V, Grievance Procedure, by not notifying the Company and the American Arbitration Association within the time frame as

required in Article V, Section 1, paragraph (d) of the Agreement?

CASE HISTORY

Article V, Section 1, paragraph (d) of the Agreement reads:

"Unless the American Arbitration Association and the Company is notified within eight (8) working days from the date which last the Local Lodge meets to select an impartial Arbitrator, the grievance or grievances shall be considered settled." (Joint Exhibit #1, p. 5)

The Company through Mr. Jennings stated that this clause had been negotiated into the Agreement in 1962 at the request of the Union. In the negotiations for the current Agreement the Union had proposed that the American Arbitration Association be substituted for the Michigan Employment Relations Commission and the Company agreed. The Company also stated that the Union did not propose any other changes to Article V, Section 1, paragraph (d) during the 1975 negotiations.

Testimony by the Union confirmed that the Lodge had met on April 6, 1976, and had discussed the grievance of Douglas Caughron. The Union decided at this meeting to carry this grievance to arbitration. The Employer contends that if the Union wanted to arbitrate the Caughron grievance it had to submit a letter to both the American

Arbitration Association and Company within eight working days as specified in Article V, Section 1, paragraph (d). The Company maintains that the Union failed to notify the American Arbitration Association and the Company within the eight (8) working days. It stated that when no letter was received within this time frame it assumed that the grievance was closed. It is the position of the Company that the grievance has been settled and that there is no grievance to be resolved by the Arbitration Proceeding.

According to the Company, notification by the Union that the Caughron grievance was going to arbitration should have been received by the Company by April 16, 1976. The Union replied that April 16, 1976, was Good Friday and was not a working day but was a paid holiday as provided for in Article VIII of the Agreement. The Union stated that notification should have been submitted by April 19, 1976.

The Union introduced a letter dated April 15, 1976, which it wrote to the Company which read:

"Please be advised that the Union has appealed the above named grievance (Douglas Caughron) to the American Arbitration Association for binding arbitration." (Union Exhibit #1)

The Company maintains that the letter of April 15, 1976, (Union Exhibit #1), was received on April

30, 1976. It introduced the letter of April 15, 1976, in evidence and stated that the Company stamps the date on all correspondence received. The stamped date of "April 30, '76" appears on the letter. (Company Exhibit #1A)

On May 3, 1976, the Company wrote a letter to the Union which read:

"In reference to your letter received April 30, 1976, concerning Douglas Caughron.

Under Article V, Section 1(d), unless the American Arbitration Association and the Company is notified within eight (8) working days from the date which last the Local Lodge meets to select an impartial arbitrator, the grievance or grievances shall be considered settled.

The Company feels that the issue is settled inasmuch as the Union did not give notice to the Company within eight (8) days as specified in Article V, Section 1(d) of the Agreement." (Company Exhibit #1B)

On May 5, 1976, the Union wrote a letter to the Company which read:

"In reference to your letter received May 4, 1976, concerning Douglas Caughron.

I must apologize for the fact that the Unions letter concerning arbitration of Mr. Caughron's grievance arrived late. I've been out of town a great deal on Union business and I was not aware that the Unions letter concerning arbitration had not been forwarded to you.

As you know from past practice both the Company and the Union have been late in administering the steps of the grievance procedure, however neither party has used this excuse to deny a grievance.

Therefore, I must inform you that I intend to follow through with the Unions demand for arbitration. If a question of arbitrability arises, it will be a matter to be properly decided by the Arbitrator.

Your co-operation and understanding in this matter, as always, is appreciated." (Union Exhibit #2)

On May 6, 1976, the American Arbitration Association wrote a letter to both the Company and Union which read in part, "The Union filed with this office on April 29, 1976, a demand for arbitration, dated April 15, 1976, requesting arbitration of a controversy arising out of a collective bargaining agreement..." (Company Exhibit #2A) Reference in this letter was made to the Caughron grievance.

On May 10, 1976, the Company wrote to the American Arbitration Association (AAA) and enclosed a copy of its letter to the Union dated May 3, 1976, (Company Exhibit 1B noted above). This letter to the AAA also contained the following paragraphs:

"In order to be a timely filed request for arbitration, a letter should have been in the hands of the Company and the American Arbitration Association no later than April 16, 1976." (Company Exhibit #2. See also Union Exhibit #3).

The Company's letter to the AAA refers to the April 16, 1976, date but as noted above the Union maintains that the deadline for notifying both the Company and the AAA was April 19, 1976.

On May 17, 1976, the AAA wrote a letter to both the Company and the Union which read:

"This will acknowledge receipt of Mr. Leslie's letter of May 5, 1976, a copy of which is herewith enclosed for Mr. Jennings.

The American Arbitration Association, after reviewing the contentions of the Parties, has determined that an issue as to arbitrability exists which could be determined by an Arbitrator. We will proceed with further administration of this matter unless otherwise requested by both Parties or unless the moving Party is stayed by court order.

Therefore, at this time we request that Mr. Jennings return the list for the selection of the Arbitrator. Unless we have received the list by May 24, 1976, all names will be deemed acceptable." (Company Exhibit #3)

On June 3, 1976, the AAA wrote to both the Company and the Union stating that Daniel H. Kruger had been selected as Arbitrator and that the date of the hearaing offered was July 8, 1976. The letter went on to say that if there was no objection to the date, it would assume that the date was acceptable.

DISCUSSION OF ISSUES AND CONCLUSIONS

The Company contends that there has been no problem with the eight (8) day notification clause in the Agreement since its inclusion in 1962. The Company moreover maintains that it is very important for the parties to observe the contractual provisions as required in Article V, Grievance Procedure of the Agreement because failure to do so could lead to chaos. The Company stated that the Union has observed the time requirements of Article V, Section 1, paragraph (d) in the past and since it did not adhere to the provisions of this Agreement in the Caughron grievance the grievance in its view is closed.

The Union in testimony by Mrs. Marion Brew, Chief Steward, stated that the Union did not always insist that Mr. Dugan, the Plant Manager, respond to a grievance within the 48 hours as required in Article V, Section 1, paragraph (b). She did not choose to file a grievance when the Plant Manager did not give his response to grievances within the 48 hours as required by the Agreement. The Union testified that it did not insist on a response from the Plant Manager since "no one was on the streets." Moreover, as indicated by the Plant Manager, relationships between the Company and the Union were good.

The Union introduced exhibits which showed that it did not insist on a response by the Plant Manager within the 48 hours requirement. On January 24, 1976, a Kenneth J. Kingstrom filed a grievance and the Plant Manager gave his response on January 29, 1976. (Union Exhibit #6) The Union noted that the response was more than 48 hours after the grievance had moved to Step 2 (Plant Manager level).

A second exhibit introduced by the Union to show that it did not insist on a 48 hour response by the Plant Manager was the grievance by Joan Wells (Union Exhibit #5). This grievance was filed on February 18, 1976, and the response by the Plant Manager was given on February 24, 1976, more than 48 hours after the grievance had moved from Step 1 to Step 2.

In the grievance in question, the Union stated that Douglas Caughron filed his grievance on February 4, 1976; the Company responded on February 6, 1976. On February 25, 1976, the Company and the Union held its first meeting (Step 3) to discuss the grievance which was not resolved at Step 2. It was pointed out that Mr. James Leslie, Business Representative, was not at this meeting but Mr. Joe Martin, Directing Business Agent for District #60 attended.

It was pointed out that the Company requested more time to reply to this grievance because Mr. Jencks, owner of the Company, was out of town and it was granted. The Company made its response to this grievance (Step 3) on March 8, 1976.

It was pointed out by the Company and confirmed by the Union that the Company response of March 8, 1976, was given well in advance of the April 6, 1976, union meeting at which time the decision was made to take the Caughron grievance to arbitration.

The Union testified that it did not know when the AAA received its letter of April 15, 1976, in which the Union stated it was appealing the Caughron grievance to the AAA.

The Arbitrator takes note that the notification letter of April 15, 1976, from the Union to the Company carries a stamped date of April 30, '76. No envelope was introduced to show when the letter was postmarked. (My italics) The letter from the AAA to the parties dated May 6, 1976, calls attention that the Demand for Arbitration of the Caughron Grievance datged April 15, 1976, was filed at the AAA office on April 29, 1976.

The Union in its letter to the Company dated May 5, 1976, acknowledges that it was unaware that its letter of April 15, 1976, was not forwarded to the Company. This letter further states that neither party in the past has used the excuse of time limits to deny a grievance (see Union Exhibit #2 quoted above).

In view of the testimony and exhibits presented at this hearing, it is the opinion of this Arbitrator that although the Company did not receive the notification that the Union was taking the Caughron grievance to arbitration until April 30, 1976, the Caughron grievance should be heard on its merits. The letter from the Union to the Company containing the notification is dated April 15, 1976, which falls within the eight (8) working days as required by Article V, Section 1, paragraph (d). No evidence was presented to indicate that it was the intent of the Union to consider the Caughron grievance settled.

In reaching this decision, the Arbitrator takes note that the parties have not used in the past the excuse of time limits to deny a grievance. Union testimony indicated that it did not insist that the Plant Manager respond to grievances within the 48 hour contractual requirement. It moreover waived the time requirements in the Caughron grievance at Step 3 in order to give the owner of

the Company, who was out of the city, the opportunity to make his input to the Company response dated March 8, 1976.

The Arbitrator in reaching his decision takes note of the testimony given by the Plant Manager in which he stated that relations between the Company and the Union are good. To deny the arbitrability of the Caughron grievance because the Company did not receive the April 15, 1976, notification letter until April 30, 1976, would, in the view of this Arbitrator, result in a deterioration of the good Company-Union relationship.

AWARD

The Arbitrator directs the parties to convene at a mutually acceptable date in order for him to conduct an arbitration hearing on the Caughron grievance.

/s/
Daniel H. Kruger
Arbitrator

Dated: July 20, 1976

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